

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RECEIVED BY HAND

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ABC

MARTEK BIOSCIENCES CORP.)
Plaintiff,)
v.) Civil Action No. 03-896
NUTRINOVA INC. and) Jury Trial Demanded
NUTRINOVA NUTRITION SPECIALITIES)
and FOOD INGREDIENTS GmbH,)
Defendants.)

**ANSWER TO COMPLAINT AND COUNTERCLAIMS
BY NUTRINOVA INC. AND NUTRINOVA NUTRITION
SPECIALTIES AND FOOD INGREDIENTS GMBH**

Defendants Nutrinova Inc. and Nutrinova Nutrition Specialties and Food Ingredients GmbH (collectively "Nutrinova"), hereby Answer the Complaint of Plaintiff Martek Biosciences Corp. ("Martek") as follows:

1. Nutrinova accepts Martek's representations of Paragraph 1, and admits the allegation.
2. Nutrinova admits the allegations in Paragraph 2.
3. Nutrinova admits the allegations in Paragraph 3 except that the Defendants' proper business address is at Industriepark Hoechst.
4. Nutrinova has insufficient information to admit or deny the allegations in Paragraph 4.
5. Nutrinova has insufficient information to admit or deny the allegations in Paragraph 5.

6. Nutrinova denies the allegations in Paragraph 6, because the term "affiliated" is not defined.

7. Nutrinova admits that Martek alleges patent infringement in this action and admits jurisdiction, but otherwise denies Paragraph 7.

8. Nutrinova admits that Martek alleges patent infringement in this action and admits jurisdiction, but otherwise denies Paragraph 8.

9. Nutrinova Inc. admits that it is incorporated in Delaware and admits personal jurisdiction, but otherwise denies Paragraph 9.

10. Nutrinova Nutrition Specialties and Food Ingredients GmbH admits this Court has personal jurisdiction over Nutrinova Nutrition Specialties and Food Ingredients GmbH, but otherwise denies Paragraph 10.

11. Nutrinova admits Paragraph 11.

12. Nutrinova admits the allegations of Paragraph 12 of the Complaint, except Nutrinova denies that the patent was duly and legally issued.

13. Nutrinova admits the allegations of Paragraph 13 of the Complaint, except Nutrinova denies that the patent was duly and legally issued.

14. Nutrinova accepts Martek's representations of Paragraph 14, and admits the allegation.

15. Nutrinova incorporates herein by reference its responses to paragraphs 1 through 14 of the Complaint, as if set forth fully herein.

16. Nutrinova admits that Nutrinova has properly and legally made, imported into this country, offered to sell and sold omega-3 fatty acids under the name DHActive™, and

intends to continue to do so. Nutrinova denies each and every other allegation of Paragraph 16 of the Complaint.

17. Nutrinova denies each and every allegation of Paragraph 17 of the Complaint.
18. Nutrinova denies each and every allegation of Paragraph 18 of the Complaint.
19. Nutrinova denies each and every allegation of Paragraph 19 of the Complaint.
20. Nutrinova denies each and every allegation of Paragraph 20 of the Complaint.

Affirmative Defenses

21. Nutrinova does not infringe any claim of U.S. Patent No. 6,451,567 ("the '567 patent").
22. Nutrinova does not infringe any claim of U.S. Patent No. 6,607,900 ("the '900 patent").
23. The claims of the '567 patent are invalid for failure to comply with, *inter alia*, the provisions of 35 U.S.C. §§ 102, 103 and 112.
24. The claims of the '900 patent are invalid for failure to comply with, *inter alia*, the provisions of 35 U.S.C. §§ 102, 103 and 112.
25. The '567 patent is invalid based on abuse of the patent laws and the Patent Office rules and regulation. Martek submitted a plurality of continuations and suppressed and/or overlooked putative inventions that were allegedly disclosed, and failed to claim such putative inventions for many years. Martek thereby obtained inequitable benefit of the patent system and such action by Martek renders the '567 patent and other resultant patents invalid on this basis.
26. The '567 patent is unenforceable, because of the applicants' inequitable conduct in the prosecution of the patent. In particular, Martek prepared, filed and prosecuted a patent application, Serial Number 07/580,778 filed on September 11, 1990, which is sued as the Martek

'567 patent. That application was prepared, filed and prosecuted with material false data. The applicants knew that the application contained false data, but nevertheless filed, continued to prosecute, and convinced the Patent Office to issue the '567 patent based on such material false data. Such misconduct constitutes inequitable conduct, and renders the '567 patent and all affiliated patents unenforceable.

27. Defendants reserve the right to assert additional defenses as may be warranted by future discovery or investigation in this action.

COUNTERCLAIMS

28. Defendants Nutrinova Inc. and Nutrinova Nutrition Specialties and Food Ingredients GmbH (collectively "Nutrinova"), hereby plead the following Counterclaims against Martek Biosciences Corp. ("Martek"), and request relief as follows:

The Parties

29. Nutrinova incorporates by reference Paragraphs 1, 2, 3, 7 and 8 of the Complaint and the above Answer, as if fully set forth herein.

30. Counterclaim Plaintiff Nutrinova Inc. is identified in Paragraph 2 of the Defendants' Response to the Complaint, set forth above, which is incorporated by reference.

31. Counterclaim Plaintiff Nutrinova Nutrition Specialties and Food Ingredients GmbH is identified in Paragraph 3 of the Defendants' Response to the Complaint, set forth above, which is incorporated by reference.

32. Counterclaim Defendant Martek Biosciences Corp. is identified in Paragraph 1 of the Complaint, which allegation is incorporated by reference.

Jurisdiction and Venue

33. These Counterclaims arise under the Patent Laws of the United States, 35 U.S.C. §§ 100 *et seq.* This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1338, and under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202.

34. Venue is proper in this Court under 28 U.S.C. §§ 1391 and 1400(b), as set forth in Martek's Complaint.

Facts

35. Nutrinova has developed and has marketed and sold, and is continuing to market a product identified as DHActive™.

36. DHActive™ is a food product comprising omega-3 fatty acids.

37. DHActive™ is made by a process using particular *Ulkenia* microorganisms. In Nutrinova's media composition, all sodium salts are sodium chloride. In addition, Nutrinova's process involves a one stage process and is not conducted in two or more stages. Nutrinova uses an initial glucose charge of more than 100 grams/liter and no additional glucose is added during the process. The final biomass density obtained in Nutrinova's process is substantially less than 100 grams/liter. The aforesaid process is hereafter referred to as the "Nutrinova Process."

38. Nutrinova has marketed DHActive™ as a food product without any specified application. Nutrinova also markets DHActive™ as an additive or supplement for certain applications.

39. Defendant Martek claims to be the owner and, on information and belief, is the owner of the '900 patent and the '567 patent, which Martek has asserted in the Complaint Martek filed in this action.

40. Defendant Martek has filed a patent infringement action against Nutrinova in this Court asserting that Nutrinova's Process infringes the '900 patent and the '567 patent.

41. In addition, Martek has asserted that Nutrinova's making, using, offering to sell or selling of DHActive™ infringes or will infringe other Martek patents, and has cited to Nutrinova a list of Martek-owned patents that identifies United States Patents Nos. 5,340,742; 5,518,918; 6,410,281; 6,566,123; 5,130,242; 5,340,594; 5,340,742; 5,688,500; 5,908,622; 6,103,225; 5,374,651; 5,550,156; 5,656,319; 5,698,244; 5,985,348; 6,054,147; 6,177,108; and 6,568,351.

42. On information and belief, Martek has asserted to third parties, including Nutrinova's potential customers, that DHActive™ infringes Martek's patent claims, and that any importation, purchase and/or use of DHActive™ by anyone in the United States constitutes an act of patent infringement.

43. Martek has filed suit and made explicit threats which have created a reasonable apprehension on Nutrinova's part that Defendants will face an infringement suit if they continue their commercial activities with DHActive™ in the United States.

44. By virtue of at least the above acts, Nutrinova has a reasonable apprehension of being sued by Martek for alleged infringement of Martek's patents in addition to the '567 and '900 patents in suit.

COUNTERCLAIM COUNT I - U.S. Patent No. 6,451,567

45. Nutrinova incorporates by reference Paragraphs 28-44, above, as if fully set forth herein.

46. Nutrinova does not infringe any claim of the '567 patent.

47. The claims of the '567 patent are invalid for failure to comply with, *inter alia*, the provisions of 35 U.S.C. §§ 102, 103 and 112.

48. The '567 patent is unenforceable, because of the applicants' inequitable conduct in the prosecution of the patent. In particular, Martek prepared, filed and prosecuted a patent application, Serial Number 07/580,778 filed on September 11, 1990 ("the 778 application"), which is a parent application from which Martek's '567 patent on its face claims priority. A claim for priority from the 778 application is also made in a declaration filed by the inventors in connection with the '567 patent. The 778 application was prepared, filed and prosecuted with material false data. The applicants knew that the application contained false data, but nevertheless filed, continued to prosecute, and convinced the Patent Office to issue the '567 patent based on such material false data. Such misconduct constitutes inequitable conduct, and renders the '567 patent and all affiliated patents unenforceable.

COUNTERCLAIM COUNT II - U.S. Patent No. 6,607,900

49. Nutrinova incorporates by reference Paragraphs 28-44, above, as if fully set forth herein.

50. Nutrinova does not infringe any claim of the '900 patent.

51. The claims of the '900 patent are invalid for failure to comply with, *inter alia*, the provisions of 35 U.S.C. §§ 102, 103 and 112.

COUNTERCLAIM COUNT III - Non-Liability as to DHActive™ and Nutrinova Process

52. Nutrinova incorporates by reference Paragraphs 28-44, above, as if fully set forth herein.

53. The Nutrinova Process for making DHActive™ does not infringe or fall within

the scope of any valid and enforceable claim of any issued United States patent owned by Martek.

54. The product DHActive™ including its importation, manufacture, use, sale or offer for sale, does not infringe or fall within the scope of any valid and enforceable claim of any issued United States patent owned by Martek.

55. Nutrinova's previous applications of DHActive™ have not infringed and the continuation of such applications or other future applications will not infringe or fall within the scope of any valid and enforceable claim of any issued United States patent owned by Martek.

56. Defendants do not infringe and are not liable for infringement, violation or abridgement of any valid and enforceable right of Martek, and will not infringe or be liable for infringement, violation or abridgement of any valid and enforceable right of Martek, by developing, importing, making, having made, licensing, using, offering to sell or selling DHActive™.

RELIEF REQUESTED

WHEREFORE, Nutrinova prays for judgment and relief against Martek, including the following relief:

- (a) Entry of an Order declaring that Defendants do not infringe any valid and enforceable claim of any Martek patent;
- (b) Entry of an Order declaring that by using the Nutrinova Process or developing, making, having made, licensing, using, importing, offering to sell or selling DHActive™, Defendants do not infringe, violate or abridge any valid or enforceable right of Martek;
- (c) Entry of an Order declaring that the claims of U.S. Patent No. 6,451,567 and 6,607,900 are invalid;

(d) Entry of an Order declaring that U.S. Patent No. 6,451,567 and any affiliated patents are unenforceable;

(e) Entry of an Order determining that this is an exceptional case under 35 U.S.C. § 285;

(f) Award to Defendants of their reasonable attorneys' fees, costs, and expenses in this action;

(g) A preliminary and permanent injunction enjoining Martek, its officers, agents, servants, employees, attorneys and those in active concert or participation with them who receive actual notice of the order by personal service or otherwise, from asserting or threatening Nutrinova, their products and/or their customers with any claim of infringement of any Martek patent;

(h) Trial by jury on all issues so triable; and

(i) Such other and further relief as the Court may deem appropriate.

Respectfully submitted,

Dated: October 24, 2003

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Nutrinova Inc. and Nutrinova Nutrition Specialties and Food Ingredients GmbH

CERTIFICATE OF SERVICE

I, Oleh V. Bilynsky, hereby certify that on the 24th day of October, 2003, I caused true and correct copies of the foregoing to be served upon the persons indicated below in the manner so indicated:

Hand Delivery

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